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OCTOBER TERM, 1966.

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No. 575

HELEN JACKSON,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF RESPONDENT.

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No. 575.

HELEN JACKSON,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the Civil District Court for the Parish of Orleans, State of Louisiana, which sustained respondent's exceptions of no right or cause of action and to the jurisdiction of the court, is unreported but appears at R. 9.

The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, affirming the District Court, is reported at 185 So. 2d 342, as is the denial of a rehearing by the Court of Appeal. The denial by the Supreme Court of Louisiana of petitioner's application for a writ of certiorari is reported at 249 La. 460, 187 So. 2d 441.

STATUTES INVOLVED.

1. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Secs. 901 et seq., particularly Secs. 903, 905, and 933.

2. Jones Act, 46 U.S.C. Sec. 688.

3. Louisiana Workmen's Compensation Act, Louisiana Revised Statutes Title 23, Sec. 1021 et seq.

4. Louisiana Revised Civil Code, Article 2315.

QUESTIONS PRESENTED.

1. May an action for damages be maintained, in direct contravention of the plain and unequivocal exclusive liability provision of the Longshoremen's Act, directly against the employer of a longshoreman, with no third party involved, for death allegedly arising out of his employment, on navigable waters aboard a vessel owned by his employer?

2. May one who is not the duly qualified administrator of the decedent's estate and who, thus, is not decedent's "personal representative", maintain an action under the Jones Act for the death of a longshoreman alleged to be a "seaman"?

STATEMENT OF THE CASE.

This was an action instituted in the Louisiana State Court for the death of a longshoreman who allegedly inhaled noxious fumes during the course of his employment by respondent, on navigable waters, aboard a vessel owned by respondent. It is alleged that respondent was negligent in certain specified particulars. It is specifically alleged that decedent was a longshoreman, "engaged in cargo operations".[1]

No third party is involved.

The original petition sought recovery under the Jones Act, the general maritime law, certain articles of the Louisiana Civil Code, particularly the state "Death Statute", Article 2315, the Longshoremen's Act, and the Louisiana Workmen's Compensation Act.[2]

In the trial court, defendant below filed the following exceptions:

1. As to the Jones Act claim, plaintiff had no right of action, inasmuch as the Jones Act gives a right of recovery to the "personal representative" of decedent, and plaintiff was not a qualified and appointed administratrix; secondly, that plaintiff had no cause of action under the Jones Act which, under the settled jurisprudence, does not apply to longshoremen;

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[1] R. 1.
[2] R. 1-5.

2. Since the Longshoremen's Act was clearly applicable, there was no cause or right of action under the state compensation act, or under state law;

3. The general maritime law does not provide a remedy for wrongful death, and in view of the exclusive provisions of the Longshoremen's Act, there can be no recovery under the general maritime law.

The trial court sustained all the exceptions and dismissed the suit. The state Court of Appeal affirmed, and the Louisiana Supreme Court denied a writ of certiorari.

SUMMARY OF ARGUMENT.

1. The Longshoremen's Act is exclusive and in place of all other liability of respondent to petitioner.

2. This is not a *Yaka*[3] case. It is a personal action for death, and no third party or third party's vessel is involved.

3. To maintain the right to damages in this case would require repeal of Section 5 of the Longshoremen's Act; would undermine the constitutional basis of that act; and is not justified by *Yaka*.

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[3] *Reed v. Steamship Yaka*, 373 U.S. 410.

4. Petitioner is not the duly qualified administratrix of decedent's estate, is not the "personal representative" of decedent, and may not maintain an action under the Jones Act; further, the act is, as a matter of law, not applicable to longshoremen.

ARGUMENT.

I.

The Longshoremen's Act Is Exclusive And In Place Of All Other Liability Of Respondent To Petitioner.

The death of petitioner's decedent allegedly resulted from his employment by respondent as a longshoreman on a vessel upon the navigable waters of the United States. Recovery for his death could not constitutionally be provided by state law.[4]

It is clear that the Longshoremen's Act applies, and that it furnishes the sole remedy here.[5]

Section 5 of the act provides:[6]

"§905. Exclusiveness of liability

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to

[4] *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334; *Ellis v. Travelers Ins. Co.*, 241 La. 433, 129 So. 2d 729.

[5] 33 U.S.C. §903 (See Appendix).

[6] 33 U.S.C. §905 (See Appendix).

the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

No better discussion of the purposes and effect of the exclusive feature of the act can be found than that set out in the views of the minority in *Ryan*.[7] As there stated, the act was "revolutionary" in its field. It took away from the longshoremen the right to sue their employers for negligence, and substituted a fixed schedule of compensation regardless of fault. Many workers and employers opposed the compensation scheme. Congress weighed the conflicting interests of the employers and employees, and struck what was considered to be a "fair and constitutional" balance. Injured employees lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently more modest recovery. As to employers, it was there said:[8]

> "And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act."

[7] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124.

[8] *Ibid*, 350 U.S. at 140.

The whole predicate of the act, and of its constitutionality, was its substitution of the benefits of the act for all the liabilities of the employer to the employee; a predicate made specific and expressed in Section 5, *supra*. This exclusiveness is a common feature of compensation schemes generally,[9] and is similarly a feature of the government's own compensation plans.[10] As recently as December 1966, this Court, in a very interesting and illuminating opinion,[11] emphasized the exclusiveness of a government compensation act,[12] and found the exclusiveness to be implied where Congress, unlike the situation in our act, had not in fact expressed it.

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[9] Larson, "The Law of Workmen's Compensation", Matthew Bender & Co., Inc. (1961 Ed.) Vol. 2, p. 135.

[10] See, for example, Federal Employees' Compensation Act, 5 U.S.C. §§751 et seq., particularly §757(b); see also *Johansen v. United States*, 343 U.S. 427; *Patterson v. United States*, 359 U.S. 495.

[11] *U.S. v. Demko*, 35 U.S.L. Week 4028 (December 5, 1966). In denying the injured party the right to sue the government under the Federal Tort Claims Act, the Court said at 35 U.S.L. Week 4029:

> "Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. [*Johansen and Patterson ibid.* Note 10] for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws. . . . . Consequently we decide this case on the *Johansen* principle that, where there is a compensation act that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group."

[12] 18 U.S.C. §4126.

There is certainly no basis, in policy, in reason, or in justice, and there is none suggested in the cases, for treating a private employee differently from a government employee, or the government as an employer differently from a private employer, in identical circumstances. The government has waived its sovereign immunity in ordinary tort situations, and has subjected itself to the same liabilities, both at law[13] and in admiralty[14] as private parties. If the exclusiveness of the compensation act is to be maintained in the case of the government, even where not express, so must also the specific and express exclusiveness be maintained as to private parties.

There are no exceptions whatsoever to the exclusive nature of Section 5 of the Longshoremen's Act; nor the slightest basis for arguing that the employer is any the less the "employer" because he is a shipowner.

In 1959, three years after *Ryan, supra,* Congress adopted an amendment to the act[15] to liberalize procedure in injured employee's rights to recover against third parties. The committee report[16] recommending the amendment expressly reiterated the exclusive feature of Section 5:

"BACKGROUND OF THE BILL

"Like other workmen's compensation laws the Longshoremen's and Harbor Workers'

[13] Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq.
[14] Suits in Admiralty Act, 46 U.S.C. §§741-752; Public Vessels Act, 46 U.S.C. §§781-790.
[15] 33 U.S.C. §933 (See Appendix).
[16] Senate Report No. 428, 86th Congress, 1st Session, 1959 U.S. Code and Administrative News, Vol. 2, p. 2134.

> Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.
>
> "Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment."

This is a plain reiteration by Congress, in the full context and significance of *Ryan* (where a third party was involved and indemnity had been allowed), that, as between employer and employee, with no third party involved, Section 5 meant what it said, and still governs the direct relations of employer and employee.

This Court has consistently resisted attempts to destroy the exclusive remedy provisions of the Longshoremen's Act, insofar as it applies to the direct relations between employer and employee.[17]

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[17] *Nogueira v. New York, N.H., & H. R. Co.*, 281 U.S. 128, in which a railroad freight handler, loading freight into railroad cars on a car float on navigable waters, sought recovery under the Federal Employers' Liability Act, and this Court

It is submitted, therefore, that Congress has provided a workmen's compensation remedy to the petitioner here, and that, as against the employer, Congress has made this remedy exclusive.

II.

This Is Not A Yaka Case. It Is A Personal Action For Death, And No Third Party Or Third Party's Vessel Is Involved.

Despite petitioner's efforts to make it appear so, this is not a case arising under the holding of *Reed v. Steamship Yaka, supra.*

This is an action for damages for the death of a longshoreman. It is an ordinary tort suit, alleging negligence, and brought directly against his employer in a state court, with no third party and no third party's vessel involved.

In *Yaka* the suit was *in rem* against an independently owned vessel, whose owner impleaded her bareboat charterer, the actual operator, who had expressly indemnified the owner and held it harmless "against any claims arising out of the operation of the vessel"

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held the Longshoremen's Act to be his exclusive remedy; *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, in which it was contended that because decedent performed the incidental function of handling the ship's lines his widow could sue for damages, and this Court held that "For those employees who are entitled to compensation, the remedy under the Act is exclusive. §5." See also *Norton v. Warner Co.*, 321 U.S. 565, where, at 569-570, the unanimous Court said:

> "The Senate Report makes clear that 'The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting and repairing ships' . . . The liability of an employer under the Act is exclusive. §5."

by the charterer.[18] The suit was not against the employer, and no judgment was given the employee against the employer.

Yaka was the classic third-party situation. Ours is not. Here, what is sought is damages, for negligence, directly and immediately from the employer, precisely and exactly what the act expressly forbids.

Yaka involved unseaworthiness, i.e., liability without fault. The original petition in the present case was based squarely on negligence.[19] If it should be contended, and we do not think it can fairly be contended, that the petition, notwithstanding its plain allegation of negligence and its plain allegation of failure to do specific things, is broad enough to include liability *without* fault, then it must be remembered that this is a death case. The general maritime law gave no cause of action for death, but the maritime law looks to the state law, and, in appropriate cases, enforces the state Death Statute.[20] The Louisiana courts have not passed upon the problem of whether there is a liability for unseaworthiness, i.e.,

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[18] *Reed v. SS Yaka*, 183 F. Supp. 69, 70 (EDPa).

[19] R. 1-5.

[20] See *The Harrisburg*, 119 U.S. 199; *The Hamilton (Old Dominion Steamship Co. v. Gilmore)*, 207 U.S. 398; *La Bourgogne (Deslions v. C.G.T.)*, 210 U.S. 95; *Western Fuel Co. v. Garcia*, 257 U.S. 233; *The Tungus v. Skovgaard*, 358 U.S. 588; *Goett v. Union Carbide Corp.*, 361 U.S. 340; *Hess v. United States*, 361 U.S. 314; *Continental Casualty Co. v. Benny Skou*, 200 F.2d 246 (4 Cir.); *Graham v. A. Lusi, Ltd.*, 206 F.2d 223 (5 Cir.); *Lee v. Pure Oil Co.*, 218 F.2d 711 (6 Cir.); *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902 (3 Cir.); *H. S., Inc., No. 72*, 130 F.2d 341 (3 Cir.); *Feige v. Hurley*, 89 F.2d 575 (6 Cir.); *Curtis v. A. Garcia y Cia.*, 241 F.2d 30 (3 Cir.); *O'Brien v. Luckenbach S. S. Co.*, 293 F. 170 (2 Cir.); *Quinette v. Bisso*, 136 F. 825 (5 Cir.); *A. W. Thompson*, 39 F. 115 (D.C., S.D.N.Y.).

without fault, under its Death Statute;[21] and the jurisprudence of this court has been that that question is necessarily and properly reserved to the state courts.[22]

In all cases, including *Yaka*, heretofore considered by this Court, there was the situation of a third party, being liable to the injured person, and being given indemnity, express or implied, from the employer.[23]

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[21] Louisiana Revised Civil Code, Article 2315 (See Appendix).

[22] See *Tungus, Goett,* and *Hess,* footnote 20, *supra.* In view of the exclusive provision of Section 5 of the act, the courts below in the present case did not reach, and could not have reached, this question.

[23] In *Ryan, supra,* the injured longshoreman sued the shipowner in a state court. The shipowner removed, and filed a third-party complaint against the stevedore. The longshoreman recovered from the shipowner, and in this Court, the shipowner recovered indemnity from the stevedore on an implied warranty of workmanlike performance. In *Yaka, supra,* the injured longshoreman proceeded *in rem* against the independently owned vessel. The shipowner impleaded the bareboat (demise) charterer, who also was the stevedore/employer, and who had expressly indemnified the shipowner. As in *Ryan,* the injured longshoreman recovered from the shipowner, who in turn recouped under the express indemnity. The longshoreman, however, made no direct recovery whatsoever from the charterer/stevedore/employer.

In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, again the suit was by the injured longshoreman against the shipowner, which, having been cast, paid the judgment and brought an independent suit for indemnity against the stevedore/employer. The only problem in this Court was whether an express warranty against negligence in the stevedoring contract negated the implied warranty of workmanlike performance.

So, too, both *Weyerhauser Steamship Co. v. Nacirema Operating Co.,* 355 U.S. 563, and *Waterman Steamship Corp. v. Dugan & McNamara,* 364 U.S. 421, by unanimous courts, involved the stevedore/employer's indemnity to the shipowner after the shipowner had been cast in favor of the injured longshoreman.

All these cases were cases of the third-party recovery contemplated by Section 33 of the Longshoremen's Act, the recovery preserved by the act where the longshoreman suffers injury by a third-party's breach of duty toward the longshoreman. In none was there any hint of liability by the employer directly to the employee.

No case in this court has involved the point of attempting to fix direct personal liability on the employer in an ordinary personal action for death based on negligence. Petitioner's position in the present case is such an attempt.

This case is wholly dissimilar from *Yaka*, involves no third party or third party's vessel, and is not controlled by that decision. This is a direct action at law by the employee's widow against the employer for damages for alleged negligence, in plain contravention of the prohibition of Section 5, and of its provision that compensation under the act shall be exclusive and in place of "all other liability" "at law or in admiralty".

III.

Maintaining The Right To Damages In This Case Requires Repeal Of Section 5 Of The Longshoremen's Act; Would Undermine The Constitutional Basis Of That Act; And Is Not Justified By Yaka.

As has been said, what we have here is a direct suit at law seeking damages for negligence from the employer of decedent. This is specifically and expressly what is forbidden by Section 5 of the Longshoremen's Act.

The act clearly contemplates two situations: one in which, under the circumstances of the case, a third party may be liable; and the other in which only the employer is liable. In the former, the injured employ-

ee's right to sue the third party is plainly preserved and protected. In the latter, the act declares, in words which should admit neither of misunderstanding nor of interpretation, that the liability of the "employer", as provided in the act, shall be "exclusive and in place of all other liability of such employer to the employee" "at law or in admiralty."

In 1959, having before it *Sieracki* (extending to longshoremen the right to damages from third parties for unseaworthiness),[24] and *Ryan* (allowing the third party indemnity against the employer),[25] and in full appreciation of those decisions, Congress liberalized the third party procedure of Section 33, but reiterated its understanding of Section 5 as the "exclusive liability for injury to an employee arising out of the employment."[26] Congress did not then repeal Section 5, or amend it to provide that the liability of the employer should be exclusive "except when the employer is the shipowner." It left the word "employer" in Section 5 express, explicit, categorical, and unqualified; and left the direct liability of the employer expressly, explicitly, categorically, and unqualifiedly, exclusively that of the act.

Petitioner's whole position disregards Section 5 as though it were not written. That position, we submit, cannot be maintained without a Congressional repeal of the section. So far from repealing the section, Congress has expressly reaffirmed it.

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[24] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85.
[25] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, *supra*.
[26] See footnote 16, *supra*.

Petitioner's complete disregard of the express provisions of Section 5 destroys the whole constitutional basis of the Longshoremen's Act. In *New York Central Railroad Company v. White*,[27] this Court established the criteria for upholding the constitutionality of the workmen's compensation scheme: the workmen's compensation act deprives the employer of some rights, makes him liable without fault, and takes from him various defenses. Similarly, it takes away the right of the employee to recover full damages for an injury sustained in the course of the employment. The Court stated, however, that the very basis of the constitutionality of the act was that both employer and employee received a *quid pro quo*.[28] To the same effect, see the comments of both majority and minority in *Ryan*. To argue now that, because this employer is also the shipowner, there may be an action directly against him personally, is to take completely away from this employer that *quid pro quo* and to destroy the fundamental basis of the constitutionality of the act.

That petitioner's position destroys the constitutional basis of the act is, of course, vital. Further, however, it renders the third party provisions of Section 33 meaningless. It seeks to put the employer in precisely the same position as a third party in the exposure to liability for damages, which the act expressly forbids, and at the same time leaves the employer subject to a claim for compensation, if the employee fails to recover damages, or recovers damages in an amount

[27] 243 U.S. 188.
[28] *Ibid.*, 243 U.S. at 203-204.

less than compensation.[29] In the true third party situation, Congress intended, and specifically so provided, that if the employer pursues the third party suit, he is to be made whole for expenses, reasonable attorney's fee (fixed by the deputy commissioner), medical benefits, amounts paid as compensation, and one-fifth of the surplus, if any; the remainder to be paid to the employee.[30] If the employee pursues the third party suit, the employer remains liable for the excess of the amounts due under the act over the amount recovered from the third party.[31] If the employee settles the third party suit, the employer's interest in that suit is expressly protected by the provision which makes the employer liable for further compensation "only if such compromise is made with his written approval."[32] Petitioner's attempt here to treat the employer as though it were a third party effectively eliminates all of these provisions: the employer, of course, cannot sue itself, and these mutually protective provisions are rendered meaningless.

Yaka does not at all justify petitioner's position. *Yaka* was the third party situation of *Ryan*,[33] with

[29] In this case, petitioner has served a copy of the original petition on the deputy commissioner (the federal official having immediate jurisdiction of claims under the Act) "to interrupt prescription" under the Longshoremen's Act, R. 3. Assuming, *arguendo*, that this is effective as a claim under the act, it clearly evidences the intention to pursue a claim under the act dependent on the outcome of this case.

[30] 33 U.S.C. §933(b) and (e), (See Appendix).

[31] 33 U.S.C. §933(f), (See Appendix).

[32] 33 U.S.C. §933(g), (See Appendix).

[33] At the risk of undue repetition, we point out that *Yaka* was a libel *in rem* against a third-party's vessel, with the bareboat charterer/stevedore/employer impleaded under an express indemnity, 183 F. Supp. 69. There was no direct suit against the employer, and no direct judgment ever rendered against the employer, see 183 F.Supp. at 77.

the difference that in *Ryan* the Court implied a warranty whereas in *Yaka* the parties had expressed it. What the minority had objected to in *Ryan* was the majority's finding an indemnity to be implied in an ordinary stevedoring contract, and permitting the third party, liable to the injured longshoreman, to recoup from the employer, the stevedore, who, the minority felt, should have been protected from such liability by the exclusive provisions of section 5. Because there was present an express indemnity in *Yaka*,[34] what was actually decided there can certainly be said logically to follow from the views of both wings of the *Ryan* Court.

Petitioner's effort to see in *Yaka* a justification for direct suits against the employer misreads the case,[35] taking it completely out of the context of its facts. The question of direct liability of the employer to the longshoreman did not there arise, and was not there decided. We do not believe that petitioner can so lightly assume the Court's intention, in *Yaka*, to repeal Section 5, to cast grave doubt on the constitutionality of the whole act, and to upset the entire carefully drawn and plainly expressed Congressional plan

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[34] *Ibid.*

[35] Two Courts of Appeals have also misconstrued it: the Ninth Circuit, *Pacific Inland Navigation Co. v. Course*, 368 F. 2d 540 (in which the concurring judge, at 542, felt constrained to say that *Yaka* "*ex necessitate* reads §5 out of the Longshoremen's and Harbor Workers' Compensation Act") and *Grace Line, Inc. and the SS Santa Juana v. Kanton*, 366 F. 2d 510, *cert. den.* 35 U.S.L. Week 3234 (January 9, 1967); *reh. den.*, 35 U.S.L. Week 3294 (February 13, 1967) and the Second, *Scopaz v. SS Santa Luisa and Grace Line, Inc.*, January 30, 1967, unreported as of the preparation of this brief.

of the longshoreman's and employer's rights as between themselves.

That different workers in different situations may have different rights is, of course, a truism. Railroad workers have different rights from other land workers; seamen different rights from land workers; workers covered by compensation acts different rights from those not covered; longshoremen injured ashore different rights from those injured on navigable waters. The plainly expressed intent of Congress that the employer's only direct liability to the longshoreman is to be that of the act is not to be abrogated because of any desire to equalize rights among different longshoremen, differently placed.

As said by this Court in *Nogueira*:[36]

> "The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress."

[36] 281 U.S. at 137-138.

Without impugning in the least the validity of *Yaka* on its facts, we submit that Section 5 of the act bars the direct liability sought to be imposed on the employer here; and that to contend otherwise is to ask this Court for the outright judicial repeal of the section, a request which should be addressed much more appropriately elsewhere. It is also to imperil the constitutionality of the act, to upset the whole congressional scheme of compensation, and to render grossly unfair and unconstitutional what has always been considered by this Court to be "a fair and constitutional balance."[37]

IV.

Petitioner Is Not The Duly Qualified Administratrix Of Decedent's Estate, Is Not The "Personal Representative" Of Decedent, And Thus Is Not The Party In Whom The Jones Act Vests The Cause Of Action. Further, The Jones Act Does Not Apply To Longshoremen.

The Jones Act,[38] which extended to seamen the cause of action for negligent injury theretofore existing in favor of railroad workers under the Federal Employers' Liability Act,[39] expressly vested the cause of action in case of death in the "personal representative" of the decedent. "Personal representative" means the duly qualified administrator or executor of

[37] Cf., the comments of Mr. Justice Black in *Ryan, supra,* 350 U.S. at 140.
[38] 46 U.S.C. §688 (See Appendix).
[39] 45 U.S.C. §§51 et seq.

the decedent's estate,[40] and the right to bring suit under the Jones Act rests only in such a duly qualified administrator or executor. It does not lie in the named beneficiaries.[41] Louisiana recognizes the distinction between "personal representative", as used in the act, and the heirs or legatees of the decedent; and in line with the federal jurisprudence, has defined the term "personal representative", as used in the act, to mean executor or administrator, and to exclude any direct action by the widow or children of the decedent.[42]

In the original petition (i.e., complaint) below,[43] petitioner did not allege that she was the duly qualified and appointed administratrix or executrix of the estate of the decedent. This fundamental lack of capacity to sue was called to the attention of petitioner and of the court below, *in limine*, by respondent's exceptions.[44] On the trial of the exception of no right of action, petitioner, under Louisiana procedure, had the opportunity to present proof[45] of her capacity to sue, but none was adduced, obviously because she had

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[40] *American Railroad Co. of Porto Rico v. Birch*, 224 U.S. 547; *Pecos & Northern Texas Railway Co. v. Rosenbloom*, 240 U.S. 439; *Missouri, Kansas & Texas Railway Co. v. Wulf*, 226 U.S. 570; *St. Louis, San Francisco, & Texas Railway Co. v. Seale*, 229 U.S. 156; *Jenkins v. Pullman Co.*, 96 F.2d 405, (9 Cir.) *aff'd.* 305 U.S. 534; *Civil v. Waterman SS Corp.*, 217 F.2d 94 (2 Cir.); *Guinther v. Philadelphia & Reading Railway Co.*, 1 F.2d 85 (3 Cir.); *Marshall v. N.Y. Central R. Co.*, 218 F.2d 900 (7 Cir.); *Phillips v. Houston Fire & Cas. Ins. Co.*, 219 F.Supp. 420 (W.D. La.).

[41] *Ibid.*

[42] *Penny v. N.O. G. N. Railroad Co.*, 135 La. 962, 66 So. 313.

[43] R. 1-5.

[44] R. 7.

[45] Louisiana Code of Civil Procedure, Articles 927 and 931 (See Appendix).

not qualified—and, so far as is known, no one else had qualified—as administratrix or executrix of the decedent's estate. The court below, it is submitted, correctly disposed of the Jones Act claim on this vital basis: petitioner is not the party in whom the right to make a claim under that act is vested.

In addition, it is specifically alleged the decedent was employed "as a longshoreman, assigned to work on the aforementioned vessel(s) aboard the same, engaged in cargo operations."[46] While the question of whether a particular employee is or is not a "seaman" is usually a question of fact for the trier of the facts,[47] that cannot be said to be the situation with regard to longshoremen engaged in the cargo operations of the vessel. We submit that this question has long been settled, as a matter of law, against petitioner.[48]

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[46] R. 1.

[47] Cf. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187; *South Chicago Coal & Dock Co. v. Bassett, supra; Gianfala v. Texas Company*, 350 U.S. 879, reversing, *per curiam* 222 F.2d 382 (5 Cir.). In no such case, however, was a longshoreman involved. The longshoreman's occupation is precisely the principal occupation which the act was passed to cover.

[48] *Swanson v. Marra Bros.*, 328 U.S. 1, in which, 328 U.S. at 6, the unanimous Court said of the Longshoremen's Act:

> "The Act both imposes liability on the employer for injuries on navigable waters to employees not including the master or members of a crew of a vessel, and makes the prescribed liability to employees within the coverage of the Act exclusive. The Act thus excludes from its benefits stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the Haverty Case."

In *South Chicago Coal & Dock Co. v. Bassett*, note 17, *supra*, in which, 309 U.S. at 256, the unanimous Court said:

> "The legislative history of the exception now before us throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy

Petitioner's reliance on *International Stevedoring Company v. Haverty*,[49] decided prior to the Longshoremen's Act, is misplaced. The act was adopted promptly thereafter to remove longshoremen from the status of seamen, and to give them the benefits of compensation. Since then, this court has consistently held that the Longshoremen's Act clearly removed the longshoreman from the application of the Jones Act.[50]

The suit, insofar as it purports to claim under the Jones Act, is brought by an improper party; and, in any event, the Jones Act has no application to longshoremen.

CONCLUSION.

We submit that this Court should hold that the Longshoremen's Act is petitioner's exclusive remedy; that *Reed v. Yaka*, a typical *Ryan* third party longshoreman case, does not control this case, since this is an action for death, directly against the employer, with no third party and no third party's vessel involved; that there is no basis whatsoever for ignoring the plain provisions of Section 5 of the Longshoremen's Act; that to allow damages in this situation would be a judicial repeal of Section 5 of the Long-

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under the Act is exclusive. §5. This made inapplicable to such employees the provision of §33 of the Merchants Marine Act (called the Jones Act) which carried to 'seaman' at their election the benefit of the Federal Employers' Liability Act."

See also *Norton v. Warner Co.*, note 17, *supra*.

[49] 272 U. S. 50.

[50] See footnote 48, *supra*.

shoremen's Act and would undermine the constitutionality of that act; that the petitioner is not the proper party to bring a Jones Act action, and that, further, as a matter of law, the Jones Act does not provide a remedy for the death of a longshoreman.

Accordingly, the decisions of the courts below were correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that copies of the foregoing brief have been served upon petitioner by mailing same to petitioner's counsel of record, Charles R. Maloney, Esquire, 816 Richards Building, New Orleans, Louisiana, 70112, first class mail, postage prepaid, at New Orleans, Louisiana on this ... day of March, 1967.

BENJAMIN W. YANCEY.

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I.

Longshoremen's and Harbor Workers' Compensation Act.

(a) 33 U.S.C. Sec. 903:

Coverage:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(b) 33 U.S.C. Sec. 905:

Exclusiveness of liability:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

(c) 33 U.S.C. Sec. 933:

Compensation for injuries where third persons are liable:

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

II.

Jones Act, 46 U.S.C. Sec. 688.

Recovery for injury to or death of seaman:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the

death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

III.

Louisiana Revised Civil Code, Article 2315.

Liability for acts causing damage; survival of action:

Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the

surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

IV.

Louisiana Code of Civil Procedure.

(a) Article 927:

Objections raised by peremptory exception:

The objections which may be raised through the peremptory exception include, but are not limited to, the following:

(1) Prescription;

(2) Res judicata;

(3) Nonjoinder of an indispensable party;

(4) No cause of action; and

(5) No right of action, or no interest in the plaintiff to institute the suit.

The court cannot supply the objections of prescription and res judicata, which must be specially pleaded. The nonjoinder of an indispensable party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, may be noticed by either the trial or appellate court of its own motion.

(b) Article 931:

Evidence on trial of peremptory exception:

On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition.

When the peremptory exception is pleaded in the trial court after the trial of the case, but prior to a submission for a decision, the plaintiff may introduce evidence in opposition thereto, but the defendant may introduce no evidence except to rebut that offered by plaintiff.

No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action.